

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

SCOTTSDALE INSURANCE CO.,

Plaintiff-Counterdefendant-Appellee,

v

MODERN SYSTEMS & SERVICES, INC.,

Defendant-Counterplaintiff-  
Third-Party Plaintiff-Appellant,

and

BAKER HOPP & ASSOCIATES,

Third-Party Defendant-Appellee.

UNPUBLISHED

April 9, 1999

No. 204702

Oakland Circuit Court

LC No. 95-503326 CK

---

Before: Gribbs, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

Defendant-counterplaintiff-third-party plaintiff Modern Systems & Services, Inc. (“Modern”) appeals as of right from the trial court’s order granting summary disposition pursuant to MCR 2.116(C)(10), to third-party defendant Baker Hopp & Associates (“Baker Hopp”). Modern also appeals the order entering judgment in favor of plaintiff Scottsdale Insurance Co. (“Scottsdale”) and the order of dismissal of counterdefendant Scottsdale. We affirm.

Modern is a temporary employee placement company. Through the Baker Hopp insurance agency, Modern purchased general liability insurance coverage from Scottsdale. When its policy with Scottsdale expired, Modern purchased insurance from a different company, informing Baker Hopp that it could obtain adequate insurance more cheaply elsewhere. Shortly thereafter, at the request of Scottsdale and in accordance with the Scottsdale policy, an audit of Modern’s business was performed. The audit showed that Modern’s gross payroll was significantly greater than reported to Baker Hopp when Modern requested quotes on insurance premiums. Based on the revised payroll amount as

determined by the audit, Scottsdale determined that Modern owed it an additional premium payment of approximately \$36,000. Modern refused to pay the additional amount.

On appeal, Modern argues that the court erred in granting Baker Hopp summary disposition pursuant to MCR 2.116(C)(10), because there existed material issues of fact with regard to whether Baker Hopp breached its duty to Modern. Modern contends that Baker Hopp had a duty to properly advise Modern as to the type and amount of insurance it required, and with regard to the implications of purchasing an audit policy. Modern further contends that because Baker Hopp did not properly advise Modern, Modern purchased more expensive insurance with broader coverage than it needed, and did so without understanding that its premiums could be increased as a result of an audit of its payroll.

An insurance agent has no affirmative duty to advise a client with regard to the adequacy of a policy's coverage unless there is a special relationship between the insurance company or its agent and the policyholder. *Bruner v League General Ins Co*, 164 Mich App 28, 31-32; 416 NW2d 318 (1987). In order to establish that a special relationship exists, there must be something more than the standard relationship between the policyholder and agent. *Id.* at 34. There must be, in a long-standing relationship, some type of interaction on a question of coverage, with the insured relying on the expertise of the insurance agent to the insured's detriment. *Id.* No such long-standing relationship was alleged or evidenced in this case, nor was evidence presented to show that Modern raised the issue of coverage. Accordingly, we find that Baker Hopp did not owe a duty to Modern and the trial court did not err in granting summary disposition to Baker Hopp.

Modern also argues that the trial court erred in entering judgment for Scottsdale and dismissing Scottsdale as counterdefendant based upon summary disposition pursuant to MCR 2.116(C)(10). Modern contends that summary disposition in favor of Scottsdale was improper because there were questions of fact regarding whether Baker Hopp was acting as Scottsdale's agent. However, in order to preclude summary disposition, the fact alleged to be at issue must be material to the dispositive legal claim. *State Farm Fire & Casualty Co v Johnson*, 187 Mich App 264, 267; 466 NW2d 287 (1990). Modern asserts that because Baker did not properly advise Modern, resulting in damage to Modern, Scottsdale is liable for those damages as Baker Hopp's principal. We find that because there was no evidence presented to support a claim that Baker Hopp acted improperly, the issue whether or not Baker Hopp was acting as an agent for Scottsdale is not material to the issue of Scottsdale's liability to Modern.

Next, Modern argues that summary disposition in favor of Scottsdale is inequitable because it would be unfair to let Scottsdale benefit from Modern's misunderstanding of the terms of the insurance policy. However, the trial court found, and Modern does not dispute, that the terms of the insurance contract were clear and unequivocal, including the coverage provided and the fact that the premiums could be adjusted as a result of a payroll audit. Where a court finds that the language of an insurance policy is clear, the court must enforce the contract as written. *Century Surety Co v Charron*, 230 Mich App 79, 82-83; 583 NW2d 486 (1998). Moreover, the insured is held to have knowledge of the terms and conditions of the policy, even if he has not read it. *Usher v St Paul Fire & Marine Ins Co*, 126 Mich App 443, 447; 337 NW2d 351 (1983).

Finally, Modern argues that even if this Court finds that summary disposition on the pleadings before the trial court was proper, the trial court should permit amendment of Modern's pleadings to include a count of fraud. MCR 2.116(I)(5), provides that if a party moves for summary disposition based on subrules (C)(8), (9), or (10), the court shall allow the parties an opportunity to amend their pleadings as provided by MCR 2.118, "unless the evidence then before the court shows that amendment would not be justified." See *Blair v Checker Cab Co*, 219 Mich App 667, 677-678; 558 NW2d 439 (1996). A motion to amend made under MCR 2.116(I)(5), ordinarily should be granted, but may be denied based upon, among other things, futility. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). Although Modern did not make a specific motion to amend its pleadings, it did request permission to do so before the trial court, and the court denied permission, finding that such amendment would be futile. The court's decision in this regard is reviewed for abuse of discretion. *Id.*

The record does not reveal that Scottsdale made any representations to Modern with regard to the insurance policy that Modern purchased, much less any *false* representations. Furthermore, Modern has not presented evidence that Baker Hopp made any such representations that could, under an agency theory, be attributed to Scottsdale. As noted previously, Modern does not contend that the insurance contract contains terms contrary to representations made by Baker Hopp, nor that Modern did not receive the coverage contained in the insurance policy, nor that Baker Hopp represented that the Scottsdale insurance policy was the least expensive. Rather, Modern simply contends that it did not understand that its premiums were more expensive than those that could be obtained through a different company, and that they could be raised as a result of an audit. Because the record in this case does not support a prima facie case of fraud, we find that the trial court did not abuse its discretion in denying Modern permission to amend its pleading to include a count of fraud against Scottsdale.

Affirmed.

/s/ Roman S. Gribbs  
/s/ Richard Allen Griffin  
/s/ Kurtis T. Wilder